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No. 84-28 and 84-143
Consolidated

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

v.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH O. EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLANTS EIKENBERRY, et al.
No. 84-143

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Federal Constitution prohibit a state legislature from defining language in an obscenity statute by Supreme Court case law rather than the A.L.I. Model Penal Code definition?

a. Did the *Roth v. United States*, 354 U.S. 476 (1957) *definition of "prurient" permit the use of the word "lust"*?

b. Did *Miller v. California*, 413 U.S. 15 (1973) and its progeny overrule *Roth* in establishing the first leg of the tripartite test of obscenity?

2. Should a federal court invalidate a state obscenity statute on the basis of facial overbreadth when state court decisions have held that a limiting construction must be placed on a state obscenity statute?

a. Should a federal court leave to state court the construction of a newly-enacted state obscenity statute when the State Supreme Court has by case law declared the *Roth-Miller* test to be the law of construction in state obscenity cases?

b. Should a federal court leave to state court a narrowing construction of terms in an obscenity statute when the State Supreme Court has adopted the same construction used by the federal courts in construing federal obscenity statutes involving similar terms?

PARTIES

Appellants: KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington; DONALD C. BROCKETT, in his official capacity as Prosecuting Attorney for Spokane County, State of Washington, JAMES SLOANE, in his official capacity as City Attorney for the City of Spokane, Washington, JEFFREY C. SULLIVAN, in his official capacity as Prosecuting Attorney for the County of Yakima, State of Washington, FRED ANDREWS, in his official capacity as City Attorney for the City of Yakima, Washington, NORM MALENG, Prosecuting Attorney of King County in his representative capacity only.

Appellees: J-R DISTRIBUTORS, INC.; AZURE ENTERTAINMENT CORPORATION OF WASHINGTON; JACK R. BURNS, in his representative capacity as EXECUTOR OF THE ESTATE OF SELOM F. BURNS; PLAYTIME THEATRES, INC., a Washington Corporation; KUKIO BAY PROPERTIES, INC., a Washington Corporation; SPOKANE ARCADES, INC., a Washington Corporation; THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC.; SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; MOTION PICTURES EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN AND MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 725 F.2d 482 (9th Cir. 1984), reproduced as Appendix A in appellants Eikenberry, et al. Jurisdictional Statement. JS A-1.

The opinion of the United States District Court, Eastern District of Washington, is reported at 544 F.Supp. 1034 (E.D. Wash. 1982), and is reproduced as Appendix B

lants Eikenberry, et al., Jurisdictional Statement. JS B-1.

The Judgment was entered July 26, 1982 in the United States District Court for the Eastern District of Washington. JA 68.

JURISDICTION

Appeal was taken from a judgment of the Court of Appeals for the Ninth Circuit which invalidated, *in toto*, a Washington State anti-obscenity statute. The Court of Appeals, in a 2-1 decision, reversed the District Court for the Eastern District of Washington which had held the Washington statute constitutional.

Jurisdiction of the district court was conferred by 28 U.S.C. § 1331, and jurisdiction of the Court of Appeals was exercised under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3).

The Court of Appeals entered its judgment on February 6, 1984. JS C-1. The order denying rehearing was entered April 6, 1984. JS D-1. A notice of appeal was filed by appellant Eikenberry on June 21, 1984 and an amended notice of appeal was filed on June 25, 1984. JS E-1, F-1. Notice of appeal was filed by appellant Sloane on July 2, 1984; by appellant Maleng on July 2, 1984; and by appellants Sullivan and Andrews on July 9, 1984. JA 69-75.

Jurisdiction is conferred upon this court by 28 U.S.C. § 1254(2).

Based on the jurisdictional statement of appellants Eikenberry, et al., the appeal was docketed in this court on July 3, 1984 as No. 84-143. On October 1, 1984 this court noted probable jurisdiction.

Constitutional and Statutory Provisions Involved

First Amendment of the United States Constitution.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment, § 1, of the United States Constitution.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Wash. Sess. Laws 1984, chapter 184, 47th Legislature, House Bill 626, reproduced in JS G-1.

STATEMENT OF THE CASE

A. History of the Case

In 1977 voters of the State of Washington adopted as an initiative a moral nuisance law that established procedures for the issuance of temporary and permanent injunctions against maintenance of a moral nuisance. Wash. Rev. Code §§ 7.48.050-100. In a decision affirmed by this Court, the Ninth Circuit found that the initiative constituted an unconstitutional prior restraint. *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 137-139 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981).

Thereafter, the 1982 Washington State legislature overwhelmingly enacted into law the instant statute.[1] This statute established a dual system of civil and criminal penalties to be assessed against those who maintain a moral nuisance as defined. Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; JS G-1.

The measure was signed into law by the Governor on April 1, 1982. Four days later appellee J-R Distributors, Inc. filed this suit facially challenging the constitutionality

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[1] In a memorandum decision granting the preliminary injunction sought by appellees, the District Court observed as follows: "It is true that the people of Washington, both as an electorate and through their representatives, overwhelmingly favor a tougher approach to controlling pornography." JA 37.

of the law in the United States District Court for the Eastern District of Washington. JA 29. Six additional appellees filed separate suits in the same court; all seven cases were consolidated by the District Court. JA 65. Thirteen days after the Governor signed the bill, and prior to any actions for enforcement, the District Court issued a preliminary injunction barring enforcement by appellants who are the public officials authorized to enforce the statute.

No trial was held and the case was submitted to the District Court on Appellees' motions for a declaratory judgment—in effect motions for judgment on the pleadings.[2] In a lengthy memorandum decision, the District Court held the statute to be constitutional, and denied the appellees any relief. *Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. 1034 (E.D. Wash. 1982). JS B-1 through B-32. In a 2-1 decision, the Court of Appeals reversed, holding the statute invalid *in toto*.

B. Washington's Anti-Obscenity Statute

The Washington statute utilizes both criminal and civil sanctions. The criminal penalties are established in Sec. 8, which provides in pertinent part:

> "A person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any *lewd matter* as defined in section 1 of this act is guilty of promoting pornography. Promoting pornography is a class C felony * * *" (Emphasis added.)

Section 1 provides the critical definitions for the whole statute, the most important of which, for purposes of this case, are found in subsections (2) and (8).

Subsection (2) defines "lewd matter" as follows:

> "Lewd matter" is synonymous with "obscene matter" and means any matter:
>
> (a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

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[2]Thus, the references to a "trial" in the opinion of the majority in the Court of Appeals are erroneous. JS A-6, A-7.

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

Subsection (8) defines "prurient," a term used in the above quoted definition of "lewd matter," as follows: " 'Prurient' means that which incites lasciviousness or lust." The terms "lasciviousness" and "lust" are not statutorily defined.

The civil sanctions, which are triggered by the maintenance of a "moral nuisance" (Sec. 4) utilize the same definitional structure as the criminal. (See especially Sec. 2, declaring what constitutes a moral nuisance.)

The law includes a severability provision. Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; JS G-1.

C. **The Court of Appeals Decision**

In its 2-1 decision, the Court of Appeals found the Washington statute unconstitutionally overbroad on its face, and invalidated it *in toto*. The court began by considering the scope of the overbreadth doctrine. It acknowledged that:

> "In the case of an ordinary facial challenge to the overbreadth of a law, 'a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.' *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 * * * (1982)." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 487; JS A-10, A-11.

The court, however, went on to read *Broadrick v.*

Oklahoma, 413 U.S. 601 (1973) as creating an exception to this general rule, i.e., as eliminating the need for *substantial* overbreadth when the challenged statute regulates speech rather than conduct. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 487; JS A-11.

The court next considered whether Washington state courts should first have an opportunity to construe the statute's provisions, and concluded that they should not. *Id.* at 487-488; JS A-11 through A-14. The court then took up and determined the most important question, whether the use of the statutorily undefined term, "lust," rendered the statute unconstitutional under *Roth v. United States*, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 13 (1973), saying:

> "Plaintiffs contend that the inclusion of 'lust' in the definition of 'prurient' impermissibly expands the boundaries of the *Miller* guidelines and renders House Bill 626 unconstitutional. We agree." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 490; JS A-16, A-17.

In so concluding, the court looked exclusively at the first prong of the *Miller* conjunctive tripartite test set forth in the statute.[3] It first noted that the Washington anti-obscenity law tracked the "prurient interest" requirement almost exactly. But then, reviewing the *Roth* decision, and specifically footnote 20 in which a number of definitions of prurient were cited—including definitions using the term "lustful thoughts"—the court went awry. Because footnote 20 "concluded" with the A.L.I. Model Penal Code definition, which did not use the word "lust" or "lustful thoughts," the Court held the Washington statute unconstitutional. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 490; JS A-18.

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[3]The District Court, in contrast, found that the plaintiffs challenge to the definition of "prurient" subjected the court to "semantical nit picking" which was avoided when one looked at the definition of obscenity as a function of the conjunctive tripartite test rather than the single statutory section defining "prurient." The District Court held the law was constitutional. *Spokane Arcades, Inc. v. Eikenberry*, 544 F.Supp. 1084 (E.D. Wash. 1982); JS B-1.

In addition, in so ruling the Court of Appeals took an unprecedented approach to obscenity jurisprudence—including what it characterized as the changed meaning of words brought about through contemporary usage. Specifically, the court found that the connotations associated with the term "lust" in 1957 were not necessarily applicable today. To support this observation, the court referenced a dictionary definition which no longer included "lust" in defining "prurient" and a Playboy magazine interview with then presidential candidate Jimmy Carter, who indicated that he had "looked on a lot of women with lust." *Id.*, JS A-18. Thirdly, the court cited the *Miller* case as having replaced the definitions in *Roth* with the A.L.I. Model Penal Code definition.

The Court of Appeals thus concluded that (1) lust is a healthy, wholesome, human reaction and (2) the only acceptable definition of prurient interest is "a shameful or morbid interest in nudity, sex or excretion." *Id.* at 491; JS A-19. At no time did the court address the other criteria comprising the first prong. Nor did it address the first prong as it related to the other two prongs of the *Miller* test.

Finally, the Court of Appeals decided that the Washington statute was not susceptible to an interpretation avoiding the constitutional challenge. *Id.* at 492-493; JS A-21. In doing so, the court did not cite or distinguish a previous State Supreme Court decision, authoritatively construing a predecessor anti-obscenity statute consistent with the *Roth-Miller* test. *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 512 P.2d 1049 (1973).

The dissent in the Court of Appeals, on the other hand, read as a whole *Roth's* footnote 20 which included "lustful thoughts" in defining prurient. The dissent then stated that the definition was unchanged in *Miller* and it concluded that this Court had never held the Model Penal Code was the only acceptable definition of "prurient." The dissent also rejected the changing meaning of words approach adopted by the majority. It concluded by citing *Broadrick* for the proposition that the statute was also

subject to a limiting construction in light of *Miller* and said that the court should refuse to decide the constitutional challenge until a case arose applying it. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 498; JS A-32 - A-40.

SUMMARY OF ARGUMENT

In challenging Washington's anti-obscenity statute, the appellees did not make any effort in the District Court or the Court of Appeals to show that they were engaged in forms of expression protected by the First Amendment. Rather, they based their challenge upon what is commonly called the "overbreadth" doctrine. That is, they invoked the First Amendment rights of purely hypothetical parties, not before the court, whose protected expression might be prohibited by the statute.

The Court of Appeals thus awarded the appellees, whose constitutional rights are not violated, "* * * a prize for bringing to judicial attention a statute's potential unconstitutional applications to third parties." L. Tribe, *American Constitutional Law* 720 (1978). It is a prize which the appellees do not deserve to keep.

The third parties conjured up by the Court of Appeals, together with the potential applications of the Washington statute relied on by the court, simply do not exist. Indeed, the imaginings which provide the basis for the court's decision rest upon a complete misreading and misapplication of the statute, combined with a no less serious misreading and misapplication of this Court's controlling decisions in *Roth* and *Miller*.

Incorporating *Miller*, the Washington anti-obscenity statute adopted a three-prong definition of "obscene matter" and its statutory equivalent, "lewd matter." That is, obscene or lewd matter must meet and fall within all of the three prongs, not just one.[4]

The Court of Appeals, however, focused only on the

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[4]This Court has previously observed that the *Miller* test for obscenity was legislatively made a part of this Washington anti-obscenity statute. *New York v. Ferber*, 458 U.S. 747, 755 n. 7 (1982).

first prong, referring to matter "which the average person, applying contemporary standards, would find, when considered as a whole, appeals to the prurient interest * * *", and which, in turn, defines "prurient" as "that which incites lasciviousness or lust." From this definition of "prurient" the court reasoned that the statute would ban any material which merely arouses normal sexual instincts and desires, such as material purveyed by "our leading couturiers, perfumers and manufacturers of soft drinks, soap suds and automobiles * * * as well as mainstream stage, movie and television producers, directors, and performers." *J-R Distributors, Inc. v. Eikenberry,* 725 F.2d at 492; JS A-20, A-21.

Even if, perchance, it is picked up by the first prong of the definition, however, such material as the Court of Appeals thus described clearly, and quite simply, would not also be impaled by the second and third prongs,—so as to constitute "obscene" or "lewd" matter. The second prong, for example, requires that the material, in order to be obscene or lewd matter, must also:

> "* * * depict[s] or describe[s] patently offensive representations or descriptions of:
>
> (i) Ultimate sexual acts, normal or perverted, actual or simulated; or
>
> (ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area;
>
> (iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and * * *"
>
> Wash. Sess. Laws 1982, ch. 184, 47th Legis., H.B. 626 § 1(2)(b); JS G-1.

This is hardly the stuff of our normal magazine, movie, and television fare, about which the circuit court was so concerned; i.e., it is more than "expressions that may merely stimulate sexual longing or desire." *J-R Distributors, Inc. v. Eikenberry,* 725 F.2d at 491.

From its misreading of the statute, the Court of Appeals concluded that "* * * to permit expression that merely excites 'lust' to be regulated by the state would

destroy the boundaries between protected and unprotected speech." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 491, JS A-19. The Washington statute, however, does not purport to regulate such expression, even under the court's broad notion of "lust" as that which merely excites normal sexual feelings. The inclusion of the second and third prong of the conjunctive tripartite test makes this absolutely clear.

The Court of Appeals also concluded that the term "lust" in the definition of prurient violates the requirements of *Miller* and perhaps of *Roth* as well. This is not so. "Lustful thoughts" and "lustful desires" were terms used in the definitions of obscenity which this Court found constitutional in *Roth* and its companion case, *Alberts*. Moreover, *Miller* did not reject the previously approved use of these terms. In formulating the now familiar three-prong test, *Miller* simply spelled out the other elements which must also be present in any constitutionally acceptable definition of obscenity—elements which the Washington definition carefully includes.

Moreover, to the extent that there nevertheless remains any legitimate doubt as to whether the statute might be construed to affect constitutionally protected expression, any such doubt should be resolved by the State Supreme Court, not the Federal Court of Appeals. Nor is there any question as to how the State Supreme Court would resolve that doubt; its prior decision in this field demonstrates that it would construe the statute to cover no more than is constitutionally permissible under *Miller*. *State v. J-R Distributors*, 82 Wn.2d 584, 512 P.2d 1049 (1973).

In bringing their injunctive action in Federal District Court four days after the statute became law, the appellees, of course, set out to prevent the state courts from having any opportunity to construe the statute. The Court of Appeals additionally erred in blessing their efforts in that regard.

Compounding its errors, the Court of Appeals further adopted an overly expansive view of the overbreadth doc-

trine, ignoring this Court's restrictions upon the application of that doctrine. In the hands of the Court of Appeals, the overbreadth doctrine has become a semantic mine field, through which a State must make its way if it wishes to control obscenity. In the hands of this Court, however, that doctrine is no such thing. Rather, the overbreadth doctrine is "strong medicine," to be used "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Finally, the Court of Appeals erroneously read *Broadrick* as cutting back on the scope of the overbreadth doctrine only when conduct, not speech, is involved. That this was error is shown by *New York v. Ferber*, 458 U.S. 747 (1982). The recently adopted restrictions on the use of that doctrine apply to statutes affecting speech as well, and obscenity in particular.

ARGUMENT

I. THE WASHINGTON MORAL NUISANCE LAW INCORPORATES THE *MILLER* THREE PRONG OBSCENITY TEST AND THE STATUTE'S DEFINITION OF "PRURIENT" IS CONSISTENT WITH *ROTH* AND *MILLER*.

The Court of Appeals declared the Washington Moral Nuisance law unconstitutional because it defined prurient as "that which incites lasciviousness or lust." Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; § 1(8). The decision "recognized the changing meanings" of the word "lust" and held that this Court had recognized only one acceptable definition of the term prurient; namely, "a shameful or morbid interest in nudity, sex or excretion." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 490-491 (9th Cir. 1984); JS A-18, 19. That decision, however, conflicts with the judicial meaning ascribed to "prurient" by *Roth* and *Miller*. Further, it wholly disregards the other requirements for a finding of obscenity set forth in the statute, particularly the "patently offensive" requirement. The Washington statute incorporates the three-prong test for obscenity established by *Miller*, 413 U.S. at 24.

Obscene material is not entitled to First Amendment protection. *Miller*, 413 U.S. at 23; *Roth*, 354 U.S. at 485. However, defining that which is obscene has been a long

and arduous undertaking. In 1973, this Court settled on a conjunctive tripartite test.[5] *Miller*, 413 U.S. at 24. In *Miller* and its progeny, this Court did not tell the states what they had to do. Rather, it defined the "area" in which state legislatures and courts could "chart their own course in dealing with obscene material." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 53-54 (1973). Moreover, this Court in *Miller* invited authoritative constructions by state courts to bring their laws within the defined area. *Miller*, 413 U.S. at 25. Nonetheless, no such opportunity was afforded the state courts in this case; the statute was signed into law April 1, 1982 and challenged in *federal* court four days later. A preliminary injunction was issued a week later, prior to any actions being filed in state court by those empowered to bring either a civil or a criminal action.

This Court undertook to define obscenity in 1957. *Roth v. United States*, 354 U.S. 476 (1957). That definition has served as the foundation of the Court's subsequent decisions addressing obscenity. *See* F. Schauer, *The Law of Obscenity* 36 (1976). The defendant, Roth, had been convicted for mailing obscene books, periodicals, photographs and advertisements of the materials in violation of a federal statute, 18 U.S.C. § 1461. At trial, Roth contended that the statute was an unconstitutional restriction on free speech.

At about the same time David Alberts was convicted under a California state law prohibiting the sale of obscene or indecent material. He challenged the constitutionality of the state statute under which he was convicted. The two cases were consolidated when this Court granted certiorari.

In *Roth*, the jury had been instructed as follows:

> "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has

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[5](a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct, specifically defined by the applicable state law; *and* (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Citation omitted.)

relation to sexual impurity and has a tendency to *excite lustful thoughts.*" *Roth,* 354 U.S. at 486. (Emphasis added.)

In *Alberts,* the trial judge used the test set forth in a California state court decision; namely, "whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting or *arousing lustful desires.*' " *Roth,* 354 U.S. at 486. (Emphasis added.)[6]

This court, in affirming both convictions, concluded that both trial courts "sufficiently followed the proper standard. Both courts used the proper definition of obscenity." *Roth,* 354 U.S. at 489. In its decision, this Court also noted that sex and obscenity are not synonymous. Obscenity deals with sex in a manner appealing to prurient interest. *Roth,* 354 U.S. at 487. In a footnote, the Court then defined the critical term in its definition, "prurient," as follows:

> 20. I.e., *material having a tendency to excite lustful thoughts.* Webster's New International Dictionary (Unabridged, 2d ed, 1949) defines *prurient,* in pertinent part, as follows:
>
> "* * * Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. * * *"
>
> *Pruriency* is defined, in pertinent part, as follows:
>
> "* * * Quality of being prurient; lascivious desire or thought * * *"
>
> See also, *Mutual Film Corp. v. Industrial Comm.,* 236 US 230, 242, where this Court said as to motion pictures: "* * * They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to* * * *" (Emphasis added.)
>
> We perceive no significant difference between the meaning of obscenity developed in the case law

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[6] *People v. Wepplo,* 78 Cal.App.2d Supp. 959, 961, 178 P.2d 853 (1947). In that case, the court stated: "A book is obscene 'if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires.' "

and the definition of the A. L. I., Model Penal Code, § 207.10(2) (Tent Draft No. 6, 1957), *viz.*:

"* * * A thing is obscene if, considered as a whole its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * *" *Roth*, 354 U.S. at 487, n. 20. (Emphasis added.)

Arguably, this Court thereby defined prurient as "material having a tendency to excite lustful thoughts." Even more persuasive, however, is the conclusion that any or all of the definitions contained in footnote 20 are available to a legislature in defining prurient. F. Schauer, *supra*, at 37. Yet the Court of Appeals in the instant case struck down the Washington statute. Why? Because, said the court, since the *Roth* footnote "*concluded*" (i.e., ended) with the A. L. I. Model Penal Code definition, that is the only acceptable definition. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 490-491; JS A-17.[7]

If this Court had truly viewed the Model Penal Code definition as the only acceptable definition, however, the convictions of both Roth and Alberts should have been reversed based on the trial court instructions.[8] But instead, this Court stated various definitions, equally acceptable in defining prurient. *Roth*, 354 U.S. at 500 (Harlan, J., concurring in No. 61 (*Alberts*), and dissenting in No. 582 (*Roth*)).

The "prurient interest" requirement serves an essential purpose in the first prong of the obscenity test: it is intended to distinguish physical sexual stimulus from in-

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[7]The dissent in the court below was in total *disagreement* with the majority on this point. "The better interpretation is to read the footnote as a whole. * * * the footnote catalogues different ways to describe the same concept. * * * The Supreme Court has never held that the Model Penal Code provides the only acceptable definition." *J-R Distributors v. Eikenberry*, 725 F.2d at 499; JS A-34, 35.

[8]The dissent in *Roth* paid particular attention to the jury instructions in both Roth and Alberts and acknowledged that the majority had accepted the instructions defining obscenity. *Roth*, 354 U.S. at 508-509. (Douglas, J., dissenting with Black, J.).

tellectual stimulus. Only those materials which are sexually stimulating are to be considered within the scope of obscenity laws. The Washington legislature recognized and furthered that purpose by defining prurient as "that which *incites* lasciviousness or lust." Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; § 1(8); JS G-2. "Prurient" thus means that which incites sexual stimulation. The statute should be read as the Washington legislature intended it to be read, not as a grammarian might read it in a vacuum.

Furthermore, the "prurient" requirement is only one aspect of the test articulated in *Roth*: "whether to the *average person*, applying *contemporary community standards*, the dominant theme of the material taken *as a whole* appeals to the *prurient interest*." *Roth*, 354 U.S. at 489 (emphasis added); *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972).[9] Isolated passages from a work are insufficient to come within the ambit of the "as a whole" requirement. Thus, if the setting is literary or political and the prurient portion(s) are an integral *and relevant* part, then the work taken "as a whole" cannot be deemed legally obscene.

The "average person" requirement in *Roth* was intended to exclude what might be considered the vulnerable, susceptible, or immune. Thus, the trier of fact must determine whether the material appeals to the hypothetical average person, not the trier personally. In addition, this average person must apply "contemporary community standards" in assessing the material. Again, the trier of fact must apply an external standard, not the trier's personal views or those of a sub-part of the community. This requirement also applies the standards of the *contemporary* community, not those of another state or country nor those of years ago or into the future.

The Court of Appeals, however, improperly relied on changing dictionary definitions as a basis to declare the Washington statute invalid:

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[9]This test was made the first of the three-prong test set forth in *Miller*. The Court of Appeals here concluded that "the Washington anti-obscenity law tracks the *Miller* prurient interest requirement almost exactly." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 490.

> The connotations that accompanied the word "lust" in 1957, when *Roth* was decided, are not necessarily the same ones that attach to the word today. For example, the most recent edition of Webster's New International Dictionary no longer includes the word "lust" in its definition of "prurient." *J-R Distributors v. Eikenberry*, 725 F.2d at 490. (Citation omitted.)

The court failed to note, however that the dictionary still defines prurient as lasciviousness and that lascivious is defined by the same dictionary as: "1: inclined to lechery: lewd, *lustful* * * * 2: tendency to arouse sexual desire * * * *" Webster's New International Dictionary (Unabridged, 3d ed., 1976). (Emphasis added.)[10] Thus, the definition becomes circular: that which is prurient is obscene; prurient is that which incites lasciviousness; lasciviousness is that which is lustful.

More importantly, the court's reliance on a dictionary definition is simply misplaced. In the area here involved, terms defining obscenity have taken on a judicial meaning. *Miller*, 413 U.S. at 18-19, n. 2. Dictionary definitions are not the operative definitions because, in that area (obscenity), legal terms are judicially defined terms. It is more important to look to the purpose behind the requirement, the context in which it is used, and the understanding of the trier of fact.

The Court of Appeals cited no authority for its reliance, in a constitutional challenge to an obscenity law, on a standard of changing dictionary definitions. In *Roth*, however, this Court said:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the

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[10]The Court of Appeals apparently found no problem with use of the word "lasciviousness" under its changing meaning approach. However, the dictionary upon which the court relied leads one to conclude that "lust" and "lascivious" are synonymous.

> proscribed conduct when measured by common understanding and practices. * * *' *Roth*, 354 U.S. at 491 (citing *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)).

In 1962, before *Miller* the "patently offensive" standard for defining obscenity emerged in a case in which the Post Office Department, after an administrative hearing, had declared three homosexual magazines to be nonmailable matters. The publishers appealed and this Court reversed the ban. *Manual Enterprises v. Day*, 370 U.S. 478 (1962). The Court held that the magazines were not so offensive as to affront community standards of decency, "a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency'." *Id.* at 482. Thus, obscenity statutes were to reach only indecent material which, under *Roth*, taken as a whole appealed to prurient interest. The Court also held that the words "obscene, lewd, lascivious, indecent, filthy or vile" in the federal statute connoted something portrayed in a manner so offensive that it was unacceptable under current community standards. *Id.* Thus, the *Roth* definition, in particular the "prurient interest" requirement, must be read as modified by the "patently offensive" requirement set out in *Manual Enterprises*.

The Court of Appeals in the instant case also disregarded in total this "patently offensive" requirement and the conjunctive nature of the *Roth* and *Manual Enterprises* definitions. This is best illustrated by the court's reference to third parties allegedly brought under the scope of the Washington statute:

> "In fact, if the arousal of good, old-fashioned, healthy lust 'is equated with an appeal to 'prurient interest,' it might be necessary to hale into court our leading couturiers, perfumers, and manufacturers of soft drinks, soap suds and automobiles' as well as mainstream stage, movie and television producers, directors and performers." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 492.

This observation by the Court of Appeals borders on the frivolous when one looks to the purpose of the "pruri-

ent interest" requirement (i.e., sexual stimulation) and reads the requirement as modified by the "patently offensive" requirement. Thus, the material (as a whole) must also be deemed so offensive as to affront the contemporary community standards of the average person. The lower court's examples are made even more ridiculous in light of the Washington statute. For there, the legislature specifically set forth the patently offensive representations or descriptions subject to its coverage; i.e.,

> "(i) Ultimate sexual acts, normal or perverted, actual or simulated; or
>
> (ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or
>
> (iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; * * *" Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; § 1(2)(B); JS G-1.

Material must meet these specific criteria which, in turn, create sexual stimulation in order to come within the "patently offensive" and "prurient interest" requirements. Thus, the material with which the Court of Appeals was concerned would come under the Washington statute only if "leading couturiers or perfumers" advertisements also contain these specific representations and meet the *Roth* test. Likewise, the Court of Appeals' reference to the comments of then presidential candidate Jimmy Carter in a Playboy magazine interview is equally without merit in light of the "patently offensive" requirement as well as the specific descriptions to which the Washington statute attach.

In 1973, this Court handed down eight decisions dealing with obscenity, the most significant of which provides the current definition of obscenity:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct, specifically defined by

> the applicable state law; *and* (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Emphasis added.) (Citation omitted.) *Miller*, 413 U.S. at 24.

This Court thus created a conjunctive tripartite test for obscenity. Material is legally obscene only if it fits *all* three prongs. The third prong however was the only one without precedent.[11] But, again, the Court of Appeals here also failed to acknowledge or address this element. Even if a play or movie, (made an example by the court below) appeals to "prurient interest" it cannot be adjudicated legally obscene unless it also meets the "patently offensive" requirement *and* lacks serious literary, artistic, political, or scientific value.

The *Miller* Court adopted the *Manual Enterprises* "patently offensive" test and the *Roth* "prurient interest" test. With regard to the latter test, the Court there noted that the words "obscene material" had taken on a specific *judicial meaning* derived from *Roth*. *Miller*, 413 U.S. at 18, n. 2. Taken in this context, the definitions of prurient contained in footnote 20 of *Roth* remain acceptable alternatives to state legislatures in drafting obscenity statutes. The Washington legislature complied with the Supreme Court precedents and the Court of Appeals' decision is an unacceptable departure from those precedents.

II. THE COURT OF APPEALS FAILED TO ADDRESS A STATE SUPREME COURT NARROWING CONSTRUCTION AND FAILED TO COMPLY WITH THE *BROADRICK* "SUBSTANTIALITY" TEST.

The Court of Appeals invalidated *in toto* the Washington State obscenity statute based on overbreadth. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 493 (9th Cir. 1984). Apparently, the court took the overbreadth doc-

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[11] In 1964 the Court had adopted the "utterly without redeeming social value" standard. *Jacobellis v. Ohio*, 378 U.S. 184 (1964). A threefold test was then announced in 1966 combining *Roth*, *Manual Enterprises* and *Jacobellis*. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). However, the "utterly without redeeming social value" standard was rejected in *Miller*.

trine to mean that if a *federal, not state, court* could imagine *an impermissible* construction, the state statute should therefore be declared invalid. The Court of Appeals thus used the doctrine in a manner which foreclosed consideration of a state court narrowing construction and ignored the need for substantiality. Such an approach contradicts the caveat that overbreadth should be used "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

The Court of Appeals erred in this case by mechanically applying the overbreadth doctrine, and ignoring the fact that this Court has significantly limited use of the doctrine in recent years. The court failed to address the specific criteria as to when the overbreadth doctrine is to be invoked and further failed to consider state court precedents setting forth the construction to be accorded a state anti-obscenity statute.

Within the context of the First Amendment, the overbreadth doctrine operates as an exception to two rules usually applied in litigation involving the constitutionality of statutes.[12] The first of those rules is that a litigant normally claims a statute is unconstitutional *as applied* to him or her. If the litigant prevails, the court may narrow the scope of the statute and invalidate what would then be an improper application to the particular situation. Underlying this approach is the common sense assumption that the legislature intended the statute to be valid; hence, it did not intend the statute to authorize what would be invalid applications. Also, as an adjunct of this rule, the person challenging the law is not generally permitted to raise the rights of third parties. That principle is based on traditional notions of comity as well as the fundamental axiom that courts should decide only actual controversies. *New York v. Ferber*, 458 U.S. 747 (1982). The second rule normally applied is to approach a statute with a presumption of constitutionality. And if construction of the statute is involved it should be construed, where possible, in a manner which preserves constitutionality. Moreover, that con-

[12]See, *City Council of Los Angeles v. Taxpayers for Vincent*, 104 S.Ct. 2118 (1984).

struction should appropriately come from the state court for a state statute. *Gooding v. Wilson*, 405 U.S. 518 (1972).

Under First Amendment overbreadth analysis, however, those two rules give way to a limited extent. A review of the application of a statute is not confined to the conduct of the specific party before the court. *Thornhill v. Alabama*, 310 U.S. 88 (1940). The approach taken is premised on the assumption that the existence of an overly broad statute may have a "chilling effect" on the exercise of constitutionally protected speech by others not before the court. If there is such a hypothetical "chilling effect" on third parties, the court may hold the entire statute invalid "on its face," not "as applied." But because the overbreadth doctrine can result in the court declaring a law invalid *in toto* in a facial challenge, it is "strong medicine" which should be employed sparingly and "only as a last resort." *Broadrick*, 413 U.S. at 613.

A common problem in adjudicating the constitutionality of a statute subject to an overbreadth challenge is how far the court should seek out *possible* unconstitutional applications. The normal rules of standing negate the need to engage in hypothetical applications because with real parties in interest the court has before it a concrete factual situation. The judicial result is therefore a refinement of the law as applied to a particularized situation rather than an invalidation *in toto*, based on hypothetical possibilities. In a case like the one now before this Court, where a legislature has attempted to promote a concededly valid goal, invalidation based on facial overbreadth can pose problems of comity between legislative and judicial branches of government.

The overbreadth doctrine was invoked with considerable frequency in the sixties. Some of the popularity of the doctrine stemmed from a sense of judicial activism dealing with constitutional questions more broadly. In doing so, the courts did not deal directly with the speech or conduct of the litigant before them because the statute was invalidated based on the *possible* application to a third party not before the court. Such application was often briefly

addressed rather than fully explored. *United States v. Rabel*, 389 U.S. 258 (1967).

The overbreadth doctrine originated in a case involving review of a state court conviction for labor picketing. *Thornhill v. Alabama*, 310 U.S. 88 (1940). In the words of the Alabama statute, the defendant was convicted of "loitering or picketing" with the intent or purpose to influence, hinder, delay or interfere with a lawful business. *Thornhill*, 310 U.S. at 91-92. The Alabama court had made no effort to narrow the sweep of the statute. This Court reversed, examining the statute on its face rather than reviewing it on the facts presented. In this facial review the Court created the overbreadth doctrine, saying:

> "There is further reason for testing the [statute] on its face * * * * Where regulations of the liberty of free discussion are concerned there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill*, 310 U.S. at 97-98. (Citations omitted.)

The *Thornhill* case thus seemed to suggest that a statute regulating speech which embraces permissible as well as impermissible applications is void on its face and not, instead, subject to a narrowing construction. However, in the first important case on the subject following *Thornhill*, this Court accepted a state court narrowing construction. *See Cox v. New Hampshire*, 312 U.S. 569, 576-578 (1941). Likewise, in the area of obscenity, this Court has since accepted the construction of the state court with regard to a state statute. *Ward v. Illinois*, 431 U.S. 767, 773-776 (1977).[13]

The extensive use of the overbreadth doctrine in the sixties led to concern and criticism in the seventies. This Court refined the role of the federal judiciary with reference to state courts in *Younger v. Harris*, 401 U.S. 37 (1971). That case involved a facial challenge to a California

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[13]The state court construed an obscenity statute in accordance with the requirements of *Miller v. California*, 413 U.S. 15 (1973).

criminal syndication law. The defendant had been indicted and he sued to enjoin prosecution. In reversing the lower court, this Court noted that "chilling effect," even in the area of First Amendment rights, should not, by itself, justify federal intervention prohibiting state action. *Id.* at 50-51. This Court then addressed a "more basic consideration": the function of federal courts in the overall constitutional plan:

> "The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; * * * But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them." *Id.* at 52.

This Court further noted that the notion of comity involved a respect for state functions—a reaffirmation of "Our Federalism." That concept was intended to recognize the need to protect constitutional rights in a manner which does not unduly interfere with legitimate activities of the states. *Id.* at 44. Concern with the overbreadth doctrine was emphasized by the Court regarding *potential* applications to parties not before it by the following factors: "relative remoteness of the controversy," "impact on the legislative process" and "above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes." *Younger*, 401 U.S. at 53.

One of the main criticisms of the doctrine has been the lack of specificity in its application. How much overbreadth renders a statute invalid *in toto*? When should the federal courts allow a state court to construe the challenged statute? How far should a court go in imagining an impermissible application of the statute to a third party not before it?

In recognition of those concerns, this Court formulated some standards for the application of the doctrine. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973). *Broadrick* involved a challenge to the Oklahoma Merit

System Act restricting political activities by classified state employees. Appellants, who had campaigned for a superior, challenged the statute on vagueness and overbreadth grounds—alleging the statute reached protected, as well as unprotected conduct. This Court, however, rejected the challenge. While the law seemed to reach some protected acts such as wearing campaign buttons or displaying bumper stickers, this Court held that those applications (though substantial in numbers) were insubstantial when compared with the law's legitimate applications. *Id.* at 609-618. In curtailment of the overbreadth doctrine, the Court said that it should not be invoked "* * * when a limiting construction *has* been or *could be* placed on the challenged statute." *Broadrick*, 413 U.S. at 613. The Court then created a further limitation on its use, namely—the requirement of substantiality:

> "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615.

This Court has also sought to accommodate the competing interests of allowing the free exercise of First Amendment rights and avoiding unnecessary interference with state legislative acts. The two criteria enunciated for application of the facial overbreadth doctrine were stated succinctly in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975):

> "In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid *unless it is not readily subject to a narrowing construction* by the state courts, see *Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965), and its deterrent effect on legitimate expression *is both real and substantial.*" See *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973). (Emphasis added.)

The first criterion recognizes a valuable institutional purpose—the need to avoid wholesale invalidation by the federal judiciary in deference to state courts. It also recog-

nizes the abilities and good intentions of state legislators in drafting statutes and the need for federal courts to avoid being barraged with hasty review of state statutes. The criteria recognizes the ability of state courts to construe state statutes in a manner which avoids constitutional infirmities. *Ferber,* 458 U.S. at 768.

The second criteria, i.e., substantiality test, avoids striking down laws merely because one can conceive of a single hypothetical impermissible application of the statute. *City Council of Los Angeles v. Taxpayers for Vincent,* 104 S.Ct. 2118, 2126 (1984). The party invoking the doctrine must demonstrate a *realistic* danger that the statute will *significantly* compromise First Amendment protections. *Id.* at 2127. *See generally* Note, *The First Amendment Overbreadth Doctrine,* 83 Harv.L.Rev. 844 (1970). It is difficult to think of a statute that is completely devoid of some potential for unconstitutionality in a unique hypothetical application. Only substantially overbroad laws, however, create the "chill" which is judicially cognizable. *Id.* at 859, n. 61. In other words, a statute should *not* be struck down for overbreadth if the number of instances in which the law could conceivably be applied to protected expression pales in comparison to the number of instances of unprotected behavior which is the law's legitimate target.

It might nevertheless be argued that the substantiality test articulated in *Broadrick* applies only to a speech/conduct continuum, with a stronger showing required to invalidate a statute based on conduct rather than speech. That question was posed in a case relating to New York's child pornography law. *New York v. Ferber,* 458 U.S. 747 (1982). The *Ferber* case involved the conviction of a bookstore proprietor under a state statute for selling films depicting young boys masturbating. The Court, in logical extension of the recent developments in the area of overbreadth analysis, concluded that the substantiality test was to be applied to speech as well as conduct, saying:

> "The premise that a law should not be invalidated for overbreadth *unless it reaches a substantial number of impermissible applications* is hardly novel. On

> most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression. * * * The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrents of protected speech can be expected to decrease with the declining reach of the regulation. This observation *appears equally applicable to the publication of books and films as it is to activities,* such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech. We see no appreciable difference between the position of a publisher or bookseller in doubt as to the reach of New York's child pornography law, and the situation faced by the Oklahoma state employees with respect to that State's restriction on partisan political activity. *Id.* at 771-772. (Emphasis added.)

The Court further noted, once again that "obscenity is not within the area of constitutionally protected speech." *Ferber,* 458 U.S. at 754 (quoting *Roth v. United States,* 354 U.S. 476, 485 (1957)). Further, the Court's analysis recognized that states have a legitimate interest in prohibiting the dissemination or exhibition of obscene material. The *Miller* standard was an accommodation between these state interests and the dangers of censorship. *Ferber,* 458 U.S. at 754-756. *Miller v. California,* 413 U.S. 15 (1973).[14]

In the instant case, the Washington moral nuisance statute underwent challenge four days after it was signed into law. Although the district court rejected the overbreadth doctrine it served as the basis for reversal by the Court of Appeals. The latter court disregarded the obvious

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[14]"When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of a case-by-case adjudication. * * * I agree that generally marginal speech does not warrant the extraordinary protection afforded by the overbreadth doctrine." *Ferber,* 458 U.S. at 780-781 (Stevens, J., concurring).

concerns of this Court and the curtailment of the overbreadth doctrine as above described. Indeed, it ignored the fact that in 1971 this Court reemphasized the traditional policies of comity and "Our Federalism" by allowing for protection of constitutional rights in a manner which does not unduly interfere with the legitimate activities of the states. *Younger*, 401 U.S. at 44. Similarly, it paid no heed to this Court's action in 1973, explicitly setting down guidelines for use of the doctrine in *Broadrick*. Nor did it acknowledge that the substantiality requirement was extended to the area of speech in 1982. *Ferber*, 458 U.S. 669-670. See also, *Vincent*, 104 S.Ct. 2118 (1984). Citing *Broadrick*, the Court of Appeals erred by premising its overbreadth holding on a lesser showing than substantial overbreadth. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 487. Moreover, the court failed to address this Court's holding in *Ferber* that the substantiality test applies generally to speech, and specifically to obscenity. *Ferber*, 458 U.S. at 669-670.

The Court of Appeals also violated the longstanding policy of this Court that the construction of state legislation should be left to state courts.[15] *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n. 7 (1973). Specifically, the court here construed the word "lust" to mean a "healthy, wholesome, human reaction." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d at 490-491.[16] The Court of Appeals undertook to construe the statute in that manner rather than leaving its proper construction to the state court. Further, it did so by applying the single construction which it believed would render the statute invalid.

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[15]This approach by the Court of Appeals is evident in another context. In a recent decision, the court en banc adopted as the new law of the Ninth Circuit the rule that questions of state law are reviewable under the same independent de novo standard as are questions of federal law. *Matter of McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984). In so holding, the Ninth Circuit stands alone among the circuits in failing to give "great weight" or "substantial deference" to district court judges' expertise in local law. *Id.* at 1403-1404. The inevitable result is that the federal appellate courts, like here, will be faced with more state law issues but with little guidance. *Id.* at 1406 (Schroeder, J., dissenting).

Case law in Washington makes it clear that the Washington court would construe its obscenity statutes in such a manner which meets federal constitutional standards. *See State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 512 P.2d 1049 (1973). In that case, an earlier obscenity statute was challenged as being unconstitutionally vague in its definition of "obscene." The state court first noted that the three elements of *Miller* had to *coalesce* before material could be declared obscene. *Id.* at 594, 512 P.2d at 1057. In defining obscene, the court concluded that the *Roth* definition was basic to the holding in *Miller* and thus it authoritatively construed the state statute in light of, and as limited by the *Roth-Miller* test. *Id.* at 601, 512 P.2d at 1060, n. 2. The Washington court sustained the law, saying:

> "We hold that the word 'obscene' as used in RCW 9.68.010, is not unconstitutionally vague when considered within the light of the *Roth-Miller* test. According to the *Roth-Miller* test, the scope of regulation is confined to works which depict or describe sexual conduct. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, portraying sexual conduct in a way that is patently offensive, and which taken as a whole does not have a serious literary, artistic, political, or scientific value. As thus *authoritatively construed* by this court, RCW 9.68.010 is sufficiently definite, when measured by common understanding and practice. *State v. J-R Distributors, Inc.*, 82 Wn.2d at 601-602, 512 P.2d at 1060.

In its decision, the Washington court also recognized the construction given similar terms in federal obscenity statutes by this Court in cases such as *United States v. 12 200-Ft. Reels*, 413 U.S. at 130, n. 7. On that count, this Court said:

> "We further note that, while *we must leave to state courts the construction of state legislation*, we do have a duty to *authoritatively construe* federal statutes where 'a serious doubt of constitutionality is raised' and 'a construction of the statute is fairly possible by which the question may be avoided'. If and when such a 'serious doubt' is raised as to the vague-

> ness of the words 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral' * * * *we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California,* * * * *" (Citations omitted.) *State v. J-R Distributors, Inc.*, 82 Wn.2d at 601, 602, 512 P.2d at 1060-61 (quoting *United States v. 12 200-Ft. Reels*, 413 U.S. at 130, n. 7).

The Court of Appeals in the instant case did not consider this state court construction. Had it done so, it would have recognized the error in its own construction. Further, it could have readily severed the definition of prurient from the statute altogether, leaving it undefined by statute but defined by case law. By rejecting both alternatives—allowing the state courts to construe the statute or severing the definition of prurient and applying the state court definition—the Court of Appeals committed a critical error.

Federal courts generally apply state rules of interpretation in construing the constitutionality of state laws. *Wakinekona v. Olim*, 664 F.2d 708 (9th Cir. 1981). In Washington, determination of whether invalidation of a part of a statute would render the whole of the statutory scheme a nullity depends upon judicial interpretation of the legislature's intent. *State v. Anderson*, 81 Wn.2d 234, 501 P.2d 184 (1982); *In re Hendrickson*, 12 Wn.2d 600, 123 P.2d 322 (1942). The standard observed for judicial invalidation of Washington statutes is as follows:

> An act of the legislature is not unconstitutional in its entirety because one or more of its provisions is unconstitutional unless the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes. *State v. Anderson*, 81 Wn.2d at 231, 501 P.2d at 185-86.

The statute in question contains a severability clause. Wash. Sess. Laws 1982, ch. 184, 47th Legis., HB 626; § 9. That clause expressly evidences intent of the legislature

that Washington's laws regulating obscenity shall endure judicial abrogation of discrete parts of the legislative scheme. The effect of enactment of a severability clause is "to minimize the possibility of a holding that the entire act is invalid." *State ex rel. Pennock v. Coe,* 42 Wn.2d 569, 585, 257 P.2d 190, 201 (1953).

It appears incontestable that the Washington legislature intended to enact and secure enforcement of laws regulating the sale and display of obscene materials. The legislative will is demonstrated by the enactment of the predecessor statutes which have endured since 1909. Wash. Rev. Code ch. 9.68.010, 020. The state legislature expressly repealed these statutes as the new statute was intended to embrace the same subject matter. If appellees are correct in asserting that Washington's legislature is guilty of definitional excess it seems abundantly clear, nonetheless, that the legislature intended to regulate the core materials which may unlawfully appeal to what the courts of Washington and federal courts would describe as a "prurient interest." Washington's statutory silence upon a definition of prurience, as a result of judicial excision of the severable definition of prurient, would not offend the Constitution of the United States. *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020, 1026 (5th Cir. 1981); *cert. denied* sub nom. 455 U.S. 913 (1982); *see also Ward v. Illinois,* 431 U.S. 767 (1977).

CONCLUSION

The Washington State legislature incorporated the *Miller* three-prong obscenity test into the moral nuisance law in question. Specifically, the Washington statute defines "prurient," used in the first prong, consistent with one of the alternative definitions provided in *Roth* and adopted in *Miller.*

The Ninth Circuit Court of Appeals declared the statute unconstitutional holding the A.L.I. Model Penal Code definition of "prurient" to be the only acceptable definition. To support this conclusion, the court relied on an unprecedented "changed meaning" criterion in defining

the term "lust" based on its contemporary usage. Such a construction is in derogation of this Court's precedents and in disregard of the conjunctive tripartite obscenity test.

The Court of Appeals relied on the overbreadth doctrine to invalidate the statute *in toto*. In doing so, the court failed to employ the "substantiality" test set forth in *Broadrick* and recently re-established for speech generally and obscenity in particular through *Ferber*. Finally, the court failed to consider the severability of the "prurient" definition, leaving the term to be defined by Washington case law.

For these reasons, the decision of the Court of Appeals should be reversed.

DATED this 15th day of November, 1984.

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